District Court of the United States for the District of Wisconsin.
In Admiralty.

THE GERMANIA INSURANCE CO. AND OTHERS *v.* THE STEAMBOAT LADY PIKE, CHRISTOPHER G. PEARCE AND OTHERS, CLAIMANTS.

A steamboat towing three loaded barges down the Mississippi river, in approaching bridge piers too closely to back or stop, the tow is driven against a pier by a sudden and unanticipated gust of wind: the carrier is not liable for loss or injury of the cargo of one of the barges.

MILLER, J.—This steamboat, at a port on the Mississippi river below St. Paul's, was contracted with to proceed up that river and up the Minnesota river to Shokopee, in the state of Minnesota, with three barges; and there to take on board the barges wheat in bulk, and to transport the same to Saranak, on the first-named river, in the state of Illinois. The wheat was put aboard the barges to be delivered in good order, *unavoidable dangers of the river* and fire only excepted. Heading down the Mississippi river, the steamboat with the three loaded barges, two on her larboard and one on her starboard side, and running between piers of the railroad bridge near St. Paul's, the larboard barge collided with a pier, and the wheat on board said barge was greatly damaged. The insurance companies having paid the loss, brought this libel.

The accident happened about three or four o'clock in the afternoon of April 24th.

Claimants allege in the answer that the steamboat and barges left Shokopee in good order, and proceeded on the trip with all possible care, caution, and skill; that when passing through the piers in the usual way, and while in the usual channel for such passage, the steamboat and barges were by a sudden gust of wind blown to the larboard, so that the larboard barge struck the pier on that side and was sunk. It is further alleged that the steamboat and barges were fully and completely manned and equipped, and in all respects river-worthy, and were carefully and skilfully managed at the time of the injury, and that the sinking and consequent loss was an unavoidable danger of the river. The charge in the libel of negligence and improper conduct is denied in the answer.

There is no doubt from the evidence that the boat and barges

were in good order for the service, fully equipped and manned, and in every respect river-worthy. There happened to be on board two captains and also two pilots at the wheel, at the time of the accident, and every man on board was then at his post of duty.

The river was high, with a current at the piers of about three miles to the hour, and nearly in line with the piers. By measurement on the ice the space between the piers was 116 feet, which probably would be increased some at a high stage of water by an inward inclination of the walls of the piers. The tow measured in breadth about 105 feet. The tow was running for the centre between the piers, and in a calm would clear them by about five and a half or six feet. Occasional gusts of wind met the tow through the day, but for an hour before reaching the piers there was a calm, and those on board had no anticipation of wind on approaching the piers. But when within the length of the boat from the piers a sudden gust of wind struck the tow and forced it against the pier and stove the barge. The boat was light, and having but a stern wheel she could not back with the three loaded barges in time to avoid the collision, but was obliged to keep on her course. The rate of speed was then about seven miles an hour. The channel seems to be divided, a portion passing between the piers, which was pursued by the tow, and a portion between the adjoining piers, which is wider, but it is said was not then taken by tows on account of a sunken barge. Other tows loaded passed in the course taken by this tow in safety; and this tow passed up safely three days before the accident, with the knowledge of the shipper. It is not settled that the current could have caused the collision with the pier. Some witnesses testify that it is unsafe to pass a tow of that breadth between those piers. And it is also testified that the piers should have been approached at a slow bell. On the other hand it is testified, by experienced river steamboat men, that the boat would be more manageable at the rate of seven miles an hour than slower. I think this latter opinion is the more satisfactory. And experience has tested the safety of passing between those piers with tows about the breadth of this one. I am well satisfied that if the piers had been approached by the tow under a high wind the boat should be condemned for unskilfulness of the officers. But there was a calm until the approach to the pier was too close to admit of avoiding the effect

of an unanticipated and sudden gust of wind. It is contended that the alleged cause of the collision was an afterthought, as it is not mentioned in the protest. The omission may possibly tend to weaken the force of the testimony on this subject; but it is not probable that such a number of witnesses, including nearly every man on board, would testify to a fabrication. I consider the alleged cause of the collision established by the proof. Libellants insured against the consequences of the collision; but did the contract of the carrier guarantee indemnity to the shipper?

The Supreme Court of the United States in *The Niagara* v. *Cordes*, 21 How. 8, lay down the position that a common carrier is responsible for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. In *Clark* v. *Barnswell*, 12 How. 272: Although the injury to a portion of the cargo may have been occasioned by one of the excepted causes, yet still the owner of the vessel is responsible if the injury might have been avoided by the exercise of reasonable skill and diligence in the storage or care of the goods on the part of the persons employed in the conveyance of the goods. The *onus probandi* then becomes shifted upon the shipper to show the negligence. This case involved exclusively the duty of a master in the stowage and care of the cargo. In *Stainback* v. *Rae*, 14 How. 532, the collision being considered the result of inevitable accident, neither party was held liable; also *The Morning Light*, 2 Wallace 550. Inevitable accident must be understood to mean a collision when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident: *Steamship Co.* v. *The New York and Virginia Steamship Co.*, 24 How. 307. In *New Jersey Nav. Co.* v. *Merchants' Bank*, 6 How. 344–347–383; it appears to be the understanding that under the exception in this bill of lading it is incumbent on the carrier, in order to relieve himself from responsibility, to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court by clear and conclusive testimony that there was no default on his part; and that every reasonable effort was made to avoid the accident. But he is not expected to warrant that his crew is

perfect, or that his boat or vessel is perfectly secure, or that he pursued the best course on his voyage. It is sufficient if the crew and vessel are in all respects adequate to the particular duty and service, and that the course taken was used ordinarily and proved to be safe.

I am satisfied that the defence is available to claimants within the exception in the bill of lading. A carrier is not responsible for the effects of sudden gusts of wind. This is a danger and accident of navigation over which he has no control, and against which his contract contains no warranty. Boisterous weather, adverse winds, and low tides are beyond the control of carriers on the ocean, and relieve them from responsibility for delay in the voyage, or injury to the cargo. Upon the same principle should a carrier not be answerable for goods lost by tempest or a sudden gust of wind. An act of God relieves the carrier when using due caution and skill.

In the case of *Amies* v. *Stevens*, 1 Strange's Rep. 128, the plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through a bridge by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time. The defendant was held not answerable, the damage being occasioned by the act of God, an extraordinary accident. In *Colt* v. *McMechan*, 6 Johns. Rep. 160, where a vessel was heading up the Hudson river against a light and variable wind, and being near shore, and while changing her course the wind suddenly failed; in consequence of which she ran aground and sunk. It was held that the sudden failure of the wind was the act of God and excused the master, there being no negligence on his part. KENT, C. J., concurred in the opinion that the sudden failure of the wind was the act of God; and an event which could not happen by the intervention of man, nor be prevented by human prudence. But he thought there was a degree of negligence imputable to the master in sailing so near the shore under a "light and variable wind," that a failure in coming about would cast him aground. "God caused the gust to blow in the one case, and in the other the wind was stayed by Him." It is well settled that when collision or loss occurs in the absence of fault on the part of the carrier, and under circumstances beyond his control from *vis major*, as from storm, or waves,

or reflux of the tide, or lightning, he is not held liable: Abbott on Shipping (Perkins' ed.) 470, 471, 472, 473, 474, 475, and cases cited.

The bill will be dismissed.

LEGAL NOTES.

PARDON—DELIVERY—REVOCATION BY NEW EXECUTIVE. *Matter of Moses De Puy*, in the District Court of the United States, for the Southern District of New York (June 1869), was a petition for discharge on *habeas corpus*. It will be recollected that the petitioner had been convicted at the January Term 1869, of this court, of having rescued distilled spirits from the custody of a revenue officer of the United States, and on March 3d 1869, President Johnson had signed a pardon, which was revoked by President Grant among the first acts of his administration. The facts, which elicited much comment at the time, appear by the judicial investigation to have been as follows: One James M. Nelson presented a petition to the President on behalf of De Puy, praying a pardon. On March 3d 1869, the President endorsed on this petition a direction that a pardon be issued, and handed this to Nelson with a direction to take it to the Attorney-General. Nelson took the petition to the Attorney-General and left it with him, receiving a letter to the Secretary of State, requesting the Secretary to issue a warrant for the pardon of De Puy, with certain recitals. Nelson took this letter to the Secretary of State, obtained a pardon which he took to the President, procured his signature and brought it back to the Secretary of State, who then signed it and directed his clerk to have the seal put to it, and to transmit it, with a letter in relation to it, to the Marshal of the Southern District of New York. Nelson asked if he could not take the pardon, but was told that it must go by mail to the marshal in the usual course of business. The pardon was dated March 3d 1869, and recited the conviction of De Puy, and the reasons in consideration of which the President pardoned him on condition of the payment of the fine which was part of his sentence. This pardon was sent by mail to the marshal, with a letter in the following terms: "Sir, I transmit herewith the President's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge. Yr. obt. servant, F. W. Seward." The pardon and letter were received by the marshal March 5th 1869. On the next day, while the pardon was still in the marshal's hands, he received a message by telegraph from the Secretary of State directing him to regard it as cancelled and return it to the State Department, which was accordingly done. The invariable custom of the State Department in issuing pardons, is to send them by mail to the United States marshal of the district in which the prisoner is confined, and the marshal usually transmits them to the keeper of the prison. The turning-point of the case was as to the delivery of the pardon, the petitioners insisting that the act of mailing it to the marshal was a full delivery in the only